No. 93-699

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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

HOWARD T. KREISNER,
Petitioner,

v.

CITY OF SAN DIEGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In opposing petitioner Kreisner's petition for writ of certiorari, respondent City accepts the heart of Kreisner's contentions: that the district court granted summary judgment based on credibility determinations and that the court of appeals reviewed the grant of summary judgment under a clear-error standard. The City nonetheless defends the procedure.

• The City argues that the procedure was proper because it occurred after an appeal and limited remand. There simply is no authority, however, for the proposition that a district court has greater discretion on remand than it does before an appeal or that a court of appeals should be more deferential

toward a district court's findings when the findings follow a remand by that court of appeals. None of the cases cited by the City so hold.

• The City argues that Kreisner's evidence is "implausible" as a matter of law. Even if a district court may make such a finding on summary judgment, the district court here did not. Instead of analyzing the *plausibility* of Kreisner's evidence, i.e., whether it put forth allegations that might be true, the district court analyzed the *credibility* of Kreisner's evidence, i.e., whether in the court's view the allegations were true based on the character and demeanor of the witnesses.

Indeed, on the record before it, the district court could not have found Kreisner's evidence to be implausible. Kreisner introduced evidence that City employee Penny Scott told ACLU employee Janet Bergo that the City "always" permitted the Christmas Committee to mount its New Testament display. Appendix to Petition for Certiorari ("Appendix to Petition") at a-101. This evidence is plausible because Scott is quoted as saying only what was true: the City "permitted" and "co-sponsored the display for 35 of the last 39 years." *Kreisner v. City of San Diego*, 1 F.3d 775, 791 (9th Cir. 1993) (Boochever, J., dissenting), *reprinted in* Appendix to Petition at a-32.

The City's citation to two conspiracy cases in support of its position thus is inapt. *McLaughlin v. Liu*, 849 F.2d 1205, 1209 (9th Cir. 1987), addresses the dismissal of circumstantial evidence on summary judgment. In contrast, Kreisner offered direct evidence in the form of live testimony to refute the City's position. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 558 (1986), addresses the plausibility of a defendant's motive to engage in certain anticompetitive conduct in view of well-understood economic theory. The plausibility of the City's motive to favor the New Testament display is unquestionable given the City's history of co-sponsorship of the display.

Again, the district court never found any evidence to be "implausible," but instead found the City's testimony to be "credible," accepted the City's evidence as "true," and concluded that the testimony Kreisner offered was false. Appendix to Petition at a-81, a-84.[1] These findings are improper on summary judgment. *See* Petition at 8 and cases cited therein.

• The City apparently concedes that the ACLU's permit request is material, but argues that it does not raise a genuine issue for trial because it was "implausible." *See* Opposition at 13. Again, no such finding was made, nor could it have been made on the record in the district court.

• The City argues that a court of appeals hearing a mixed question of law and fact should apply "the clearly erroneous rule to the fact portion of the mix and the plenary [de novo] review standard to the legal component." *Id.* The City cites one case, *Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1573 (11th Cir.), *cert. denied*, 498 U.S. 998 (1990), for the proposition that a court of appeals should review a district court's fact findings on summary judgment for clear error. The decision so states, but in merely a passing reference. In any case, it is against the overwhelming weight of contrary authority cited in Kreisner's Petition.[2] In addition, the City

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[1] The City argues that the district court "delineated only one Finding which referenced witness credibility." Opposition to Petition for Certiorari ("Opposition") at 10. In fact, there are at least four such references. *See* Appendix to Petition at a-81 ("This court finds Scott to be a *credible* witness after listening to her testimony and observing her demeanor"); *id.* ("This court also found Krasovich to be a *credible* witness and accepts his testimony regarding the City's policy as true"); *id.* at a-84 ("After considering all of the evidence and *observing the demeanor* of the witnesses, the court concludes that the ACLU simply desired to test the City's policy ..."); *id.* ("This court accepts as *credible* Scott's testimony that she was waiting for Bergo to provide her more specific information ...") (emphasis added in all parentheticals).

[2] *Stephens* in turn relies on *United States v. Wilson*, 894 F.2d 1245, 1254 (11th Cir. 1990), which applied the mixed-question standard to a district

fails to explain how the district court's finding that two City employees testified credibly, for example, presents such a mixed question.

• The City argues that Kreisner failed to preserve his discovery objection by failing to file a Rule 56(f) affidavit. The City does not deny Kreisner's allegation that the City created the discovery dispute by reneging on its agreement to provide discovery documents, or that the district court foreclosed discovery on the City's motion. *See* Petition at 3. Kreisner then objected on the record to the lack of discovery. Appendix to Petition at a-93 to a-95. Because the district court previously had ruled against Kreisner on the same discovery issue, a formal Rule 56(f) motion would have been futile. On these facts, no Rule 56(f) affidavit was required.

• The City argues that Kreisner somehow waived his objection to the remand procedure. The City relies on a statement[3] made by Kreisner's attorney at oral argument in the Ninth Circuit more than five months *before* that court issued its remand order. The statement the City cites has nothing to do with the remand procedure.

Rather, in the statement at issue, Kreisner argued that the court of appeals could find as a matter of law that the City's alleged policy was a pretext to favor the Christmas Committee's New Testament display, and could thereby grant his summary judgment motion. *See* Appendix to Reply at a-1 to a-3. Later during the same argument, the City represented for the first time that it had an unwritten first-come, first-served policy under which it granted permits for unattended displays. *See Kreisner*, 1 F.3d at 800 (Boochever, J., dissenting) (*reprinted in* Appendix to Petition at a-50). As the City's own

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court's denial of a motion to suppress evidence in a criminal case. The rule in *Wilson* offers no support for *Stephens*.

[3] The statement is not reprinted in the City's Appendix, but appears in the Appendix to Reply at a-3.

excerpts of record demonstrate, Kreisner then urged the court of appeals to remand for trial after it appeared the panel was moved by the City's representation. *See* Appendix to Opposition at A-5.

CONCLUSION

There is no reasoned justification for the tortured procedure in this case. Far from refuting Kreisner's contentions, the City's arguments forcefully illustrate two reasons to grant the writ: the court of appeals' decision conflicts with established summary judgment law, and the court of appeals' decision, if unchecked, could wreak havoc with regard to established summary judgment law and standards for appeals and remands. For the foregoing reasons and for the reasons set forth in the Petition, the Court should grant the writ.

Dated: December 13, 1993

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APPENDIX

EXCERPTS OF TRANSCRIPT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD T. KREISNER,
Plaintiff,

v.

CITY OF SAN DIEGO,
Defendant.

Case No. 90-55354

DC No. CV-88-1993-WBE

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS
BEFORE: BOOCHEVER, KOZINSKI, and
O'SCANNLAIN, Circuit Judges

Pasadena, California
April 3, 1991 9:00 a.m.

* * *

THE COURT: But what does the, you know, it permeates your brief, but, reference to the history of this practice, ah, and the City takes umbrage at that, or at least issue with it.

And, how much, they say, look, the past is gone, you know, why bring it up.

What, what can we make of the fact that, that obviously this has a genesis in, um, joint action or actually it was action of the City. What do we make of that, if anything?

MR. JACOBS: I think you make a couple of things of it.

First of all, from the, from our standpoint, you make of it that the City, in order to insulate itself from establishment

clause challenge has to be very, very careful. And very, very sensitive to establishment clause concerns in order to immunize itself.

Given the past history, and given the common understanding that this was a co-sponsored event, the City may have to do, I think, we believe the City has to do a little bit more than it might have to do otherwise in order to overcome the impression of the appearance of endorsement.

There are a couple [of] things you can't make of it.

You can't make of it that this is a long-standing historical practice, and therefore immunized.

Those long-standing, the long-standing historical practice has time and time again been rebuffed in the context of sectarian, sectarian displays.

It obviously matters in the context of what the courts call ceremonial deism, in God we trust and God save this honorable court.

THE COURT: It's the *Marsh* case—

MR. JACOBS: That's exactly—legislative prayer.

The history matters there. The history insulates that kind of government-ese, that kind of speech from, or helps insulate it. It's not determinative. It helps insulate it from establishment clause challenge.

But the history of sectarian displays is, in the view of the precedent, largely irrelevant. The fact that the City was looking back, perhaps, retrospectively, it was in violation doesn't help the City. It may not terribly much hurt it. But it certainly doesn't help the City.

But it also leads in to the, to, to a, it ought to affect how you view the record.

The history matters because we think what's going on here is favoritism. It's not non-discrimination in favor of all, all sects or non-sects. It's not a true effort to create—

THE COURT: This is a factual issue, if anything.

Are you, you're claiming you want to go back for trial on that?

MR. JACOBS: No. I think you can decide this case without sending us back to, to trial.

But I think you can—

THE COURT: Can we? I mean, can we draw those kind of inferences? I mean, ah, on what is here?

MR. JACOBS: I think you know from the record that nothing in the, that nothing supports the City's contention—I think the City has the burden of coming forward on this—nothing supports the City's contention that it acts out of generalized, non-discriminatory free speech concerns.

There's no, the City doesn't point to a policy, opening up the floor to general uses. Ah ha, we discovered there's a new kind of user out there, ah, unattended displays, we really like unattended displays, let's promulgate a policy. They didn't do that.

What they did was, in the, in the face of a, of a public outcry and reversal of the City opinion, the City attorney's opinion, they came up with a pretext for continuing the presence of the display.

And I think you can draw those inferences from the record.

THE COURT: When you talk about pretext, is that quintessentially a factual determination?

Just as like, isn't it factual determination whether or not they would or can or do grant permits to other artists?

MR. JACOBS: I, as I read Lynch for example? Or, or Allegheny? I think you can draw purpose, you can draw purpose inferences. This court can draw purpose inferences on the basis of the religious content of the display and the fact that before it was co-sponsored and now it's not co-sponsored formally.

And that the City has created a special exemption. There's no dispute about that in the record.

There's no dispute that the—the City can't point to a policy, or even an actual permit that's been issued here, consistent with policy.

And, nor can you look at that display in that context. In that organ pavilion. And conclude that it's a non-exclusive use.

As the question, as the discussion earlier pointed out, it's not non-exclusive as to the space it occupies.

* * *